83-181

NO. _____

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1983

BALDWIN COUNTY WELCOME CENTER,

Petitioner

vs.

CELINDA BROWN,

Respondent

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

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DATE: October 20, 1983

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OPINION BELOW

Relying upon the decision in Wrenn v. American Cast Iron Pipe Co., 575 F.2d 544 (5th Cir. 1978) and the other authorities cited therein, the Eleventh Circuit, reversing the district court below, held:

> "The remedial nature of [Title VII] requires such an interpretation. Additionally, such a holding is consistent with past decisions which liberally construe actions brought by individuals without a lawyer. Haines v. Kerner, 404 U.S. 519, 520 (1972). Brown's diligence in this case was sufficient to justify the District Court's attention to her matter."

With this, the Eleventh Circuit found that under the facts presented, respondent's filing of her right-to-sue letter

satisfied the 90-day statutory limitation provided for in 42 U.S.C. §2000e-5(f)(1).

JURISDICTION

Respondent adopts the jurisdictional statement set forth in petitioner's brief.

QUESTION PRESENTED

Whether, under the facts of this case, respondent's filing of an EEOC right-to-sue letter with a court of appropriate jurisdiction tolls the 90-day limitation provided for in 42 U.S.C. §2000e-5(f)(1)?

STATUTORY PROVISIONS INVOLVED

42 U.S.C. §2000e-5(f)(1).

STATEMENT OF THE CASE

A. STATEMENT OF THE COURSE OF PROCEEDINGS BELOW AND DISPOSITION OF THE CASE BELOW:

On November 6, 1979, Ms. Celinda Brown filed her original complaint with the Equal Employment Oportunity Commission[1] alleging, inter alia, discriminatory treatment by her prior employer, Baldwin County Welcome Center.[2] A fact-finding conference and other mediation efforts by the EEOC in conjunction with respondent's complaint were not productive and, on January 27, 1981, a right-to-sue letter was issued to her by the United States Department of Justice. (R. 1). The right-to-sue letter instructed respondent to, "... take [it], along with any correspondence you have received from the Justice Department or the Equal Employment Opportunity Commission, to the Clerk of the United States District Court in Montgomery." (Emphasis supplied). (R. 1). Ms. Brown followed these instructions faithfully, filing the right-to-sue letter and a typed request for appointment of counsel in the Middle District on March 17, 1981 (R. 7), well within the 90-day period required by 42 U.S.C. §2000e-5(f)(1).[3]

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[1]That complaint was further amended by respondent on or about December 10, 1979. (R. 37).

[2]Petitioner suggested by way of their answer below that the Alabama Bureau of Publicity and Information, as opposed to the Baldwin County Welcome Center, is the appropriate state agency (the actual employer of respondent) (R. 42); their counsel accepted service on behalf of that agency.

[3]Respondent's good faith efforts to get her case in

Judge Robert E. Varner of the Middle District granted respondent leave to proceed in forma pauperis[4] (R. 13), and transferred the case to the Southern District on April 6, 1981. According to the Magistrate, the file was received by him on April 14, 1981. (R. 15). The following day, he entered an order requiring, among other things, that respondent again make application for court-appointed counsel using the Southern District's own form and supporting questionnaire. (R. 17-18). Ms. Brown did so, and it was not received by the Court until May 6, 1981.[5] (R. 19-23)

At the Magistrate's suggestion in his order of April 15, 1981 (R. 17-18), Ms. Brown drove 75 miles from her home to

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federal court become more greatly pronounced when one considers her place of residence, Sulligent, Alabama, a remote rural community situated in Lamar County, approximately 180 miles from the Middle District Courthouse in Montgomery, and 270 miles from the Southern District Courthouse in Mobile.

[4]By way of footnote, the Magistrate made the following observation in his order: "This Court has no local rule, and apparently no standing order, dealing with [whether the 90-day statute of limitations is tolled by the filing of a right-to-sue letter]. The situation appears to be the same in the Middle District of Alabama." (R. 28). Regarding the latter observation, it is apparently incorrect. There is in fact a local rule dealing with the question: "Upon application to proceed in forma pauperis and presentation or filing of the right-to-sue letter, the 90-day statute of limitations is tolled until the Court rules on plaintiff's petition to proceed in forma pauperis."

[5]For reasons, unclear to this writer, the Magistrate noted that this was, "..., almost a week after the ninetieth day." If respondent's filing in the Middle District was timely, then the 90-day requirement of 42 U.S.C. §2000e-5(f)(1) had no relevance to the date she applied for

the nearest office of Legal Services situated in Tuscaloosa, Alabama. That office, in turn, transferred the case to the Mobile Regional Office, which undertook representation of her and filed a verified amended complaint on June 9, 1981. (R. 33-37).

Although the Magistrate in his order of May 7, 1981 was critical of respondent for her perceived lack of diligence in pursuing the matter (R. 27-29), it is respectfully suggested that such criticism was and is ill-founded. Given the distances from respondent's residence to the Middle and Southern Districts, given the distances between respondent's residence and the Tuscaloosa and Mobile Offices of Legal Services, given the instructions of the EEOC to respondent to file in the Middle District, given the fact that the case was transferred, sua sponte, by the Middle District Judge, and given the fact that Ms. Brown has been forced to deal with the courts and her attorneys principally via the U.S. Mails, it is suggested that the chronology of respondent's efforts to get her case in court evidences the fact that she was wholly diligent in this regard.

On December 24, 1981, the District Court dismissed all allegations in respondent's COMPLAINT relating to discrimination under Title VII. (R. 67-68).

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court-appointed counsel in the Southern District.

The District Court, however, did not dismiss the claims made in paragraph 8 of the original COMPLAINT:

> "Further, [respondent] alleges and avers that her aforementioned termination was based in whole or substantial part upon her legitimate exercise of rights secured under Amendment I and Amendment XIV of the United State Constitution and, more specifically, that her termination was based in whole or substantial part upon her filing of her original complaint with the EEOC prior to such termination, such act constituting her legitimate exercise guaranteed by Amendment I and Amendment XIV of the United States Constitution to freely petition her government for redress of grievances."

On January 4, 1982, respondent filed a MOTION TO AMEND ORDER TO CONTAIN APPLICATION TO ALLOW INTERLOCUTORY APPEAL OR, IN THE ALTERNATIVE, MOTION TO RECONSIDER. (R. 74-75). The District Court entered an AMENDED ORDER the following day, agreeing, "[t]hat the December 24, 1981 order involves a controlling question of law as to which there is substantial ground for difference of opinion ..." (R. 70-71), resulting in the interlocutory appeal to the Eleventh Circuit pursuant to 28 U.S.C. §1292(b) which was timely perfected thereafter. (R. 76).

This appeal resulted in the January 31, 1983 per curiuim order of the Eleventh Circuit, reversing and remanding the case to the district court and setting aside its dismissal of respondent's Title VII claims. Petitioner's request for reconsideration with suggestion for rehearing en banc was denied on April 8, 1983.

B. FACTS:

The facts of the case are set forth above. Additionally, those facts alleged by respondent in her initial pro se filing in the district court (R. 7), and those of her attorney thereafter (R. 33-37) must, on appeal, be deemed true given the Rule 12, sua sponte dismissal by the district court.

REASONS FOR DENYING THE PETITION FOR WRIT OF CERTIORARI

A. INTRODUCTION

At the suggestion of the Magistrate,[6] the District Court below refused to allow respondent to proceed with her claims for relief arising under Title VII, 42 U.S.C. §§2000e, et seq.[7]

The sole issue presented on appeal to the Eleventh Circuit and now for this Court's review, if certiorari is granted, is whether, under the facts of this case, respondent's filing of an EEOC right-to-sue letter with a court of appropriate jurisdiction tolled the 90-day limitation provided for in 42 U.S.C. §2000e-5(f)(1).

Although there is authority, which will be discussed herein, holding that would-be plaintiffs who do nothing to bring their cases to the attention of a federal court prior to the expiration of the 90-day statutory period are time-barred, this writer has found no reported decision dismissing a Title VII action where the would-be plaintiff, as here, has formally brought the matter to the attention of

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[6] "If the filing of the right-to-sue letter is 'filing of a complaint with the court' within the meaning of Rule 3 of the Federal Rules of Civil Procedure, this is a case in which the 'complaint' can be amended. If it is not, of course, this file is not a lawsuit. That question is one for the district judge." (R. 29).

[7] "The court holds that the plaintiff has forfeited her right to pursue her Title VII claim because of her failure to file a complaint which meets the requirements of Rule 8 of the Federal Rules of Civil Procedure within ninety days

a federal court. Were this Court to hold otherwise, it would have the effect of overruling a long line of federal court decisions holding that equitable principles should apply vis-a-vis the 90-day statute of limitations provided for in 42 U.S.C. §2000e-5(f)(1). Eg., Wrenn v. American Cast Iron Pipe Co., 575 F.2d 544 (5th Cir. 1978).

Denying would-be plaintiffs a federal forum to redress violations of their civil rights runs counter to the remedial purpose and congressional intent upon which Title VII of the Civil Rights Act of 1964 was and is grounded. Eg., Leake v. University of Cincinnati, 605 F.2d 255 (6th Cir. 1979).

Lastly, the holding of the district court was at odds with the recent decision of the United States Supreme Court in Zipes v. Trans World Airlines, Inc., 455 U.S. 385, 102 S.Ct. 1127, 71 L.Ed.2d 461 (1982)[8] and its progeny, which holds that the provisions granting district courts jurisdiction under Title VII, 42 U.S.C. §2000e-5(e) and (f), does not limit jurisdiction over those cases in which there has been a timely filing with the EEOC.[9]

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after receiving her right-to-sue letter from the United States Department of Justice on January 27, 1981." (R. 68).

[8]In all deference and fairness to the district court below, it did not at the time of its December 24, 1981 order appealed from have the benefit of Zipes, supra, and its resolution of the theretofore split of authority as to whether the filing requirements contained in 42 U.S.C. §2000e-5(e) and (f) were jurisdictional.

[9]Zipes, supra, will be analyzed in greater detail herein.

Based upon the foregoing reasons, respondent respectfully requests that the petition be denied or, if granted, that a decision be rendered consonant with Zipes and the substantial number of federal decisions which have uniformly followed the teachings of Zipes.

Suffice it to say at this juncture that, although the case dealt with the timely filing of charges with the EEOC, 42 U.S.C. §2000e-5(e), as opposed to the timely filing of a right-to-sue letter, 42 U.S.C. §2000e-5(f)(1), the court did in its ratio decidendi analogize to the split of authority with respect to the latter, 90-day filing requirement.

B. SUMMARY OF THE ARGUMENT

Under the facts of this case,[10] respondent's COMPLAINT (to the extent it raised claims under Title VII) was not due to be dismissed in that the district court's holding that the, "... simple filing of the right-to-sue letter was inadequate to commence a civil action under 42 U.S.C. §2000e-5(f)(1)," (R. 67), is simply not the law. More specifically, the 90-day filing requirement contained in that provision is not jurisdictional. Zipes, supra,

Furthermore, the district court failed to take into consideration equitable principles[11] mandated by such cases as Leake v. University of Cincinnati, 605 F.2d 255 (6th Cir. 1979).

Lastly, the practical implications of the district court's dismissal of respondent's Title VII claims runs counter to the congressional intent and purpose upon which Title VII, 42 U.S.C. §§2000e, et seq., is grounded.

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[10] Set forth in detail herein at pgs. 2-6, infra.

[11] Respondent's diligent efforts to secure counsel and, more importantly, to make timely efforts to bring her claims before the attention of a court of competent jurisdiction.

C. ARGUMENT

Prior to this Court's decision in Zipes v. Trans World Airlines, 455 U.S. 385, 102 S.Ct. 1127, 71 L.Ed.2d 234 (1982), there was, as noted by petitioner (Petitioner's Brief at pg. 7), a split of authority among the circuits as to the effect of a would-be Title VII litigant's failure to file a formal Rule 8 complaint within the 90-day period allowed for in §42 U.S.C. §2000e-5(f)1). However, counsel for petitioner can cite to the Court no pre-Zipes federal decision in which the Title VII claims were dismissed as against a plaintiff who filed with the federal court something prior to the expiration of the 90-day limitation and within a reasonable time thereafter cured any technical pleading defect.[12]

In Huston v. General Motors, 477 F.2d 1003 (8th Cir. 1973), the plaintiff received his right-to-sue letter from the EEOC on March 21, 1972. The right-to-sue letter contained a memo which, when signed, constituted a request for the district court to appoint counsel and commence the action without payment of fees, costs, or security. The letter and certain documents, sent to Huston by the EEOC, were tendered to the Clerk of the District for the Western District of Missouri. The Clerk did not file the document;

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[12]Save the action taken by Judge Hand in the instant case. Brown v. Baldwin County Welcome Center, unrptd. Docket No. 81-0241-H (S.D. Ala., Dec. 24, 1981). The sole case considering the issue in the Southern District of Alabama

rather, he entered an order appointing counsel for plaintiff. A formal complaint was filed on May 22, 1972, which was beyond the then 30-day limit. The Eighth Circuit held that the request for appointment of counsel constituted the commencement of a civil action within the meaning of Title VII. The Court further stated that the district Ccurt should specify a reasonable time period thereafter for the filing of a formal complaint consistent with the requirements of Rule 8 of the Federal Rules of Civil Procedure.

As noted, the respondent here remained pro se until some time after the Magistrate's order of April 15, 1981 and, thereafter, the case was transferred from the Legal Services Office situated in Tuscaloosa to that situated in Mobile. Given this, the following language from Huston, supra, has relevance to the facts at bar:

> "A layman, completely unksilled in the law, cannot be expected to file a formal complaint within the short period of time specified in the statute, and he should not be forced to forfeit his claim when he has done everything in his power within 30 days to bring about legal proceedings to enforce his rights." 477 F.2d at 1008.

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prior to Brown was Witherspoon v. Mercury Freight Lines, 59 L.C. 9219 (S.D. Ala. 1969). In Witherspoon, per Thomas, it was held that the plaintiff's petition for appointment of counsel was sufficient to institute his cause of action. The plaintiff, relying on this statement, filed a formal complaint the following month and the lawsuit proceeded. Unfortunately, no further facts were set forth.

Another leading pre-Zipes case allowing a plaintiff additional time in which to file a formal complaint beyond the statutory period was Harris v. National Tea Company, 454 F.2d 307 (7th Cir. 1971). In Harris, supra, the material dates were as follows:

(1) June 24, 1970: Plaintiff received his right-to-sue letter.

(2) June 29, 1970: Plaintiff petitioned the district court for appointment of counsel.

(3) July 1, 1970: The district court denied plaintiff's petition.

(4) July 30, 1970: Plaintiff again petitioned the court for counsel and the petition was granted.

(5) September 14, 1970: Plaintiff's counsel filed a formal complaint.[13]

The Harris court, stating that the language of the statute is clear and unambiguous and must be strictly adhered to by the judiciary, held that a plaintiff must file with the court his complaint within the statutory period. However, the court concluded that the statutory period was tolled upon the plaintiff's first request for counsel. The statute of limitations resumed when the attorney was appointed after plaintiff's second request of July 30;

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[13]The case arose prior to the amendment of 42 U.S.C. §2000e-5 increasing the period from 30 to 90 days. Therefore, in Harris, the ultimate filing of a formal complaint came 52 days after the statutory deadline.

therefore, the attorney had 24 days in which to effectuate and file a formal complaint. Thus, the failure of plaintiff to file a formal complaint within the 24 days is subject to proper dismissal for want of subject matter jurisdiction. See also, Reyes v. Missouri-Kansas-Texas Railroad Company, 43 F.R.D. 923 (D.C. Kan. 1971).[14]

Again, in Pace v. Super Valu Stores, Inc., 55 F.R.D. 187 (S.D. Iowa 1972), the District Court, citing with approval Huston and Harris, supra, reached the same result based upon the following chronology:

(1) April 14: Plaintiff received a right-to-sue letter.

(2) May 10: Plaintiff filed documents with the Clerk of the District Court, including the right-to-sue letter and request for appointment of counsel.

(3) May 27: The court entered an order denying plaintiff's request and ordered plaintiff 20 days in which to file a formal complaint.

(4) June 2: Plaintiff filed a handwritten complaint.

(5) July 15: Counsel was appointed.

(6) October 1: Counsel filed an amended and substituted complaint.

Thereafter, defendant filed a motion to dismiss or, in the alternative, motion for summary judgment. The Court

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[14]"... the filing of the notice of the right-to-sue letter within the statutory period ... is sufficient to toll the statute ...; the filing of a complaint within a reasonable

held that the papers filed on May 10 without aid of counsel constituted the commencement of the action and met the statutory requirement; thus, plaintiff's action was not subject to dismissal. Moreover, the court reasoned, even if the filing of the papers on May 10 did constitute the commencement of an action, congressional purpose would be satisfied by following the line of cases tolling the statute of limitations by filing the right-to-sue letter within the statutory period and filing a formal complaint within a reasonable time thereafter. This, of course, is precisely what happened in the case at bar.

Arguably, if the appellant here had filed nothing prior to the expiration of the statutory period, the action would be due to be dismissed. Prophet v. Armco Steel, Inc., 575 F.2d 579, 580 (5th Cir. 1978). However, where, as here, a pro se plaintiff makes good faith efforts to diligently and timely approach the court with a right-to-sue letter and written request for counsel, equitable considerations should be entertained due to the harshness and finality of a dismissal with prejudice. So was the wisdom of the court in

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time thereafter, ... constitutes substantial compliance with the Act." 43 F.R.D. at 296. The Court went on to indicate that it based its decision primarily upon the remedial purpose of Title VII. See also, Rice v. Chrysler, 327 F.Supp. 80-84 (E.D. Mich. 1971); Torockio v. Chamberlain Mfg. Co., 328 F.Supp. 578, 580 (W.D. Pa. 1971); McQueen v. E.M.C. Plastic Co., 302 F.Supp. 881 (E.D. Tex. 1969).

Leake v. University of Cincinnati, 605 F.2d 255 (6th Cir. 1979). There, the court stated that the statute of limitations are, "... jurisdictional in the sense that the phrase in relation to the statute of limitations of equitable principles should apply in circumstances which warrant their application." 605 F.2d at 259.[15]

Without exception, those pre-Zipes cases refusing to apply equitable principles and declaring the time requirements of 42 U.S.C. §2000e-5 to be absolutely jurisdictional,[16] arose from fact situations where the would-be plaintiff did nothing (i.e., filed nothing) until after the lapse of the time requirement. As noted, the respondent here did in fact get herself to the courthouse well before the expiration of that period and, thereafter, complied, to the best of her ability, with the instructions from the courts.

With this background, the Fifth Circuit's 1978 ruling in Wrenn v. American Cast Iron Pipe Co., 575 F.2d 544 (5th Cir.

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[15]See also, Fox v. Eaton Corp., 615 F.2d 716 (6th Cir. 1980) (filing of a Title VII action in state court within the 90-day period tolled the statute for purposes of a subsequent federal Title VII claim after the state court action, on appeal, was dismissed for want of jurisdiction over such claims); Wright & Miller, Civil §1214. Cf., Wong v. Bon Marche, 508 F.2d 1249 (9th Cir. 1975); Genovese v. Shell Oil Company, 488 F.2d 84 (5th Cir. 1973).

[16]E.g., Genovese v. Shell Oil Company, supra.

1978), came as no surprise. The issue before the court in Wrenn, supra, was identical to that at bar. The holding (per Roney) was that the statute of limitations contained in 42 U.S.C. §2000e-5 is mandatory and, "... plaintiffs who do nothing to call their case to the attention of the District Court before the period runs will suffer dismissal." (Emphasis supplied). 575 F.2d at 546.[17]

However, where the right-to-sue letter is filed within the period of limitation, the Court flatly held:

> "... in the specific context of Title VII, the statutory requirement that an action be 'brought' within the time period is satisfied by presenting a right-to-sue letter to the court and requesting the appointment of counsel." (Emphasis supplied) 575 F.2d at 546.[18]

In summary, Genovese, supra, governed when the would-be plaintiff did nothing to bring his or her case to the attention of the District Court. However, where, as here, the plaintiff had filed a right-to-sue letter and a written request for appointment of counsel within the statutory period, the requirement of 42 U.S.C. §2000e-5(f)(1) was deemed satisfied. Or, as the Sixth Circuit noted in Leake

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[17]Citing, Genovese v. Shell Oil Company, 488 F.2d 84 (5th Cir. 1973); Goodman v. City Products Corp., 525 F.2d 702 (6th Cir. 1970).

[18]In harmonizing the Wrenn decision with the earlier Fifth Circuit decision in Genovese, supra, the Court cited Huston v. General Motors Corp., 477 F.2d 1003 (8th Cir. 1973) and Pace v. Super Valu Stores, Inc., 55 F.R.D. 187 (S.D. Iowa 1973). See also, Carlile v. South Routt School Dist., 652 F.2d 981 (10th Cir. 1981); Coke v. General Adjustment Bureau, Inc., 640 F.2d 584 (5th Cir. 1981); Hart v. J. T.

v. University of Cincinnati, supra:[19]

> "... the mere fact that a federal statute providing for substantive relief also sets a time limitation upon the institution of suit does not restrict the power of the federal courts to hold that the S of L is tolled under certain circumstances not inconsistent with the legislative purpose." 614 F.2d at 1054.

Having thus far analyzed what are hopefully all of the reported pre-Zipes federal decisions on the issue at hand, it must nonetheless be conceded that some of that case law[20] had clouded that issue and, no doubt, confused the district court below. The slate was cleaned, however, by the U.S. Supreme Court decision in Zipes v. Trans World Airlines, Inc., 455 U.S. 385, 102 S.Ct. 1127, 71 L.Ed.2d 234 (1982). In Zipes, supra, "[t]he primary questions in these cases is whether the statutory time limit for filing charges under Title VII of the Civil Rights Act of 1974, 78 Stat. 253, as amended, 42 U.S.C. §§2000e, et seq., (1970 ed.) is a jurisdictional prerequisite to a suit in the District Court." As noted, the procedural facts of the case involved

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Baker Chemical Co., 598 F.2d 829 (3rd Cir. 1979); Laffey v. Northwest Airlines, Inc., 567 F.2d 429 (D.C. Cir. 1976); Moshos v. Dist. Council of New York, Locak Union 1456, 386 F.Supp. 21 (S.D. N.Y. 1974); Reyes v. Missouri-Kansas-Texas R. Co., 53 F.R.D. 293 (D.C. Kan. 1971).

[19]Cited by the Fifth Circuit with approval in Platoro Ltd., Inc. v. Unidentified Remains, Etc., 614 F.2d 1051 (5th Cir. 1980).

[20]To include several older decisions by the U.S. Supreme Court which loosely referred to the filing requirements of 42 U.S.C. §2000e-5(e) and (f) as "jurisdictional". See, Electrical Workers v. Robbins & Myers, 429 U.S. 229, 240

the 180-day filing requirement of 42 U.S.C. §2000e-5(e) (filing of discrimination charges with the EEOC). However, the ratio diciendi of the Court involved an analogy of case law decided in conjunction with the 90-day requirement of 42 U.S.C. §2000e-5(f)(1), and resulted in a holding, "... that filing a timely charge of discrimination with the EEOC is not a jurisdictional prerequisite to a suit in federal court, but a requirement that, like a statute of limitations, is subject to waiver, estoppel, and equitable tolling." 102 S.Ct. at 1132.[21]

The Court continued:

> "In Love v. Pullman Co., 402 U.S. 522 (1972),we announced a guiding principal for construing the provisions of Title VII. Declining to read literally another filing provision of Title VII, we explained that a technical reading would be 'particularly inappropriate in a statutory scheme in which laymen, unassisted by trained lawyers, initiate the process.' 404 U.S., at 527. That principle must be applied here as well." 102 S.Ct. at 1134.
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> "By holding compliance with the filing, not be a jurisdictional prerequisite to filing a Title VII suit, but a requirement subject to waiver as well as tolling when equity so requires, we honor the remedial purpose of the legislation

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(1976); United States Airlines, Inc. v. Evans, 431 U.S. 553, 555, n.4 (1977); Alexander v. Gardner-Denver Co., 415 U.S. 36, 47 (1974); McDonnell Douglas Corp. v. Green, 411 U.S. 792, 798 (1973).

[21] In its analysis, the Court (per Justice White) looked to the legislative history of the statutory provisions in question in reaching its decision. Each point made in this

> as a whole without negating the particular purpose of the filing requirement, to give prompt notice to the employer." 102 S.Ct. at 1135.

Here, respondent was likewise without the assistance of counsel when she filed her right-to-sue letter and request for appointment of counsel in the Middle District of Alabama (well within the 90-day period). As noted, the Middle District accepted jurisdiction of the case and granted respondent's motion to proceed in forma pauperis. Then, sua sponte, the Middle District transferred the case to the Southern District of Alabama which, in turn, required respondent to submit additional paperwork and documentation. Respondent, still unassisted by counsel, attempted to do so to the best of her ability. It should also be noted that notwithstanding her request, respondent was never afforded court-appointed counsel by either the Middle or Southern Districts.[22]

At no time, either in the district court, on appeal to the Eleventh Circuit, or here, has petitioner claimed or even suggested that it had been prejudiced by this chronology or that it did not have notice in fact that from November 6, 1979 (the date appellant filed her original EEOC

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analysis applies with equal force to both the 180-day limitation of §42 U.S.C. §2000e-5(e) and the 90-day analog of 42 U.S.C. §2000e-5(f)(1).

[22]The April 15, 1981 order of the Magistrate below (R. 17-18) which "... reminded [respondent] that a complaint must be filed within ninety (90) days after the Notice of Right To Sue, ...", also, "... advised [respondent] to

complaint) and all times forward, respondent was doggedly pursuing a race discrimination claim against them.[23]

Petitioner, in brief, has totally ignored those federal decisions which had followed in the wake of Zipes, supra. Unhampered by the pre-Zipes confusion over jurisdictional issues which non-compliance of the provisions of §§2000e-5(e) and (f) was thought to engender,[24] those decisions, virtually without exception, have gone straight to the issue of whether there exists any of the factors which should cause equitable tolling to obtain.

The analytical process and resulting unformity of result of these decisions is crystal clear:

A. None of Title VII's pre-conditions for filing suit are jurisdictional:

In Jackson v. Seaboard Coast Line Railroad Co., 678 F.2d 992 (11th Cir. 1982), the appellate court broadly declared that;

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approach the Legal Services Corporation and any other legal aid office on her own to see if she can obtain representation." (R. 18). This respondent did, driving to the nearest office of Legal Services Corporation in Tuscaloosa (75 miles one way) which, in turn, referred the case to Legal Services situated in Mobile, Alabama, situs of the Southern District. The attorney-client relationship between respondent and respondent's counsel was cemented on or about May 24, 1981 and respondent's AMENDED COMPLAINT was promptly filed on June 9, 1981. (R. 31-37).

[23]In this regard, see, McCrary v. Metropolitan Life Ins. Co., 408 F.Supp. 414 (D.C. Mass. 1976).

[24]Although the lone case of Banks v. Teletype Corp., 563 F.Supp. 1358 (E.D. Ark., 1973), has erroneously held that Zipes, supra, is no authority in cases involving the 90-day

> "... although the [Supreme Court and the old Fifth Circuit] have not had occasion to address the nature of each of Title VII's pre-conditons, we discern no rational basis for treating those that have not been considered from those that implicitly or explicitly have been held not to be jurisdictional." 678 F.2d at 1009.

Similarly, in Fouch v. Jekyll Island-State Park Authority, 713 F.2d 518 (11th Cir., 1983), that appellate court went on to hold that, "[t]herefore, Jackson mandates that all Title VII requirements to suit are henceforth to be reviewed as conditions precedent to suit rather than as jurisdictional requirements." (Emphasis supplied). (Citing, Zipes, supra), 713 F.2d at 1525.[25] Accord; Watson v. Republic Airlines, Inc., 553 F.Supp. 939, 942 (N.D. Ga., 1982; Scarlett v. Seaboard Coast Line Railroad Co., 676 F.2d 1043, 1049 (5th Cir. 1982); Pinkard v. Pullman-Standard, 678 F.2d 1211, 1217-18 (5th Cir. 1982).[26]

It should be noted that at no time prior to the district court's sua sponte decision to dismiss respondent's Title

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limitation period of 42 U.S.C. §2000e-5(f)(1), that same decision does expressly recognize the principle of equitable tolling. 563 F.Supp. at 1360.

[25]Fouch, supra, involved the failure on the part of the would-be plaintiff to obtain a right-to-sue letter from the state attorney general and held that such failure was not jurisdictionally fatal to that litigant's federal Title VII claims. Cf., Garrison v. International Paper Co., 714 F.2d 757 (8th Cir. 1983) (dicta).

[26]Although not directly relevant to the issue at bar, the federal courts, using the same type of equitable notions,

VII claims for want of jurisdiction, did petitioner ever raise such issue itself, make any noises to the effect that it had been prejudiced by the manner in which respondent initiated her federal lawsuit, or claim that any condition precedenst to filing that lawsuit were not met. In any event, the factual chronology as to what transpired in conjunction with filing her Title VII claims, the precise dates of the various filings which she made (both pro se and thereafter with the assistance of counsel), and the ensuing procedural events, are not in dispute between the parties. The findings of the Magistrate in his recommendation, those of the district court judge in his sua sponte dismissal of the Title VII claims, and those of the Eleventh Circuit reversing that dismissal, are likewise undisputed. Therefore, this Court, if it accepts review by way of the petition for writ of certiorari, is in a position to find as a matter of law whether or not there was failure on the part of respondent to timely file in terms of conditions precedent to her Title VII lawsuit and, of course, whether or not Zipes obviates any jurisdictional issues.

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have uniformly held that the failure or refusal of the EEOC to issue a right-to-sue letter does not, under 42 U.S.C. §2000e-5(f)(1), preclude a Title VII litigant from his day in court. E.g., Perdue v. Roy Stone Transfer Corp., 690 F.2d 1091 (4th Cir., 1982).

B. Where the would-be Title VII litigant files nothing with the Court within the 90-day period, equitable tolling will not obtain:

Actual notice to the defendant of the commencement of a federal action within the 90-day period is the touchstone. Cox v. Consolidated Rail Corp., 557 F.Supp. 1261 (D.C. D.C. 1983), Therefore, and quite predictably, federal courts have generally refused to apply equitable considerations where the would-be Title VII litigant has done nothing in terms of commencing such a lawsuit within the 90-day period.[27]

However, even the foregoing line of authority has been rejected by some federal courts based upon the remedial effect of Title VII and the liberal underpinnings of congressional intent in enacting the Civil Rights Act of

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[27]See, Lewis v. Conners Steel Co., 673 F.2d 1240 (11th Cir. 1982) (possibility of right-to-sue letter being sent to outdated address insufficient); Bell v. Eagle Motor Lines, 693 F.2d 1086 (11th Cir. 1982) (plaintiff allegedly out of town when right-to-sue letter received by wife not sufficient); Law v. Hercules, 713 F.2d 691 (11th Cir. 1983) (right-to-sue letter picked up by plaintiff's minor son and left on kitchen table not sufficient); Rice v. New England College, 676 F.2d 9 (1st Cir. 1982) (plaintiff mailed complaint on 88th day which was received by Clerk of Court on 91st day not sufficient); David v. Sears, Roebuck & Co., 29 F.E.P. 1341 (D.C. Mass. 1982) (mere fact that complaint filed one day late creates no equitable consideration); Aljadir v. University of Pennsylvania, 547 F.Supp. 667 (E.D. Pa. 1982) (plaintiff's alleged receipt of incorrect instructions from Clerk's Office did not warrant tolling of 90-day statute); Harper v. Burges, 701 F.2d 29 (4th Cir. 1983) (plaintiff's failure to notify EEOC of change of her address precluded equitable tolling of 90-day statute); Davis v. Sears, Roebuck & Co., 708 F.2d 862 (1st Cir. 1983) (distance between plaintiff's home and the courthouse insufficient to cause equitable tolling).

1964.[28]

Of course, this Court, if it does accept review of this case, would not have to extend its holding so as to allow for equitable tolling where nothing is done by the would-be Title VII litigant, however, such a holding would in no way do violence to Zipes, supra, or any other precedent of this Court. Regardless, respondent, as set forth in her statement of facts herein, infra, did get herself to the federal courthouse in the Middle District of Alabama well prior to the expiration of the 90-day period, thereby causing notice in fact of her complaint to be served upon petitioner and petitioner's counsel. Cox, supra.

C. Where the would-be Title VII litigant files something with the Court within the 90-day period so as to give the defendant actual notice that the matter is being judicially pursued, equitable tolling will obtain:

Petitioner will be able to cite to this Court no federal post-Zipes decision running counter to the above proposition of law.

As noted, actual notice of the filing of a Title VII action within the 90-day period clearly appears to be the test. Equitable tolling obtains regardless of whether the substance of what is filed comports with the niceties of

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[28]See, Thomas v. KATV Channel 7, 692 F.2d 548 (8th Cir. 1982) (receipt of right-to-sue letter by plaintiff's attorney did not constitute receipt by plaintiff and equitable tolling should be allowed); Decker v.

federal pleading so long as the defendant is not prejudiced, a factor not involved in the case at bar. Cox v. Consolidated Rail Corp., supra. In Cox, supra, the plaintiff's attorney had filed a complaint within the 90-day period which clearly did not comport with the district court's local rules. In fact, the Clerk rejected the complaint which was thereafter refiled in the correct form, but six days after the running of the 90-day statute. The court summarily allowed for equitable tolling.

From the time that respondent first filed her complaint with the Equal Employment Opportunity Commission, petitioner was placed on notice that she was pursuing a race discrimination claim against it. Moroever, within days of her filing of the ensuing right-to-sue letter (based upon the original EEOC complaint) with the federal court of the Middle District of Alabama, she reapprised and noticed petitioner with great specificity that she was pursuing a claim under Title VII for race discrimination.[29] Petitioner, therefore, was in no way surprised, prejudiced, or otherwise harmed by the technical failure to have a Rule

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Anheuser-Busch, 558 F.Supp. 445 (M.D. Fla. 1983) (same result); Billings v. Wichita State University, 557 F.Supp. 1348 (D.C. Kan. 1983) (unclaimed right-to-sue letter sent certified mail and to which plaintiff claimed no knowledge did not bar Title VII lawsuit filed 14 months later).

[29]See, Information Sheet For Appointment of Counsel (filed May 6, 1981) (R. 22-23), Amended Complaint (filed June 9, 1981) (R. 41-45).

8-type complaint filed against it prior to the expiration of the 90-day statutory period.

CONCLUSION

With this, it can hardly be said that the federal courts, "are groping for an equitable rule by which to interpret the Title VII statute of limitations." (Petitioner's Brief at pg. 7). To the contrary, this area of the law amid the morass of Title VII, enjoys uncommon clarity attributable primarily to this Court's holding in Zipes, supra.

Able counsel for petitioner has advanced the notion that there exists some practical distinction between the initial filing of a complaint with the Equal Employment Opportunity Commission and the filing of a complaint in federal court -- the former being a, "layman's action unassisted and unencouraged"; the latter conditioned upon the issuance of the right-to-sue letter. (Petitioner's Brief at pg. 8). Experience and an understanding of the practical machinations and the subtle nuances of Title VII actions (at all stages) renderes such a distinction more apparent than real.

Drafting an EEOC complaint now requires legal acumen well beyond the ken of the layperson victimized by acts of discrimination.[30] There is no basis upon which to argue

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[30]The 180-day limitation must be adhered, Zipes, supra;

or suggest that a claim of discrimination filed with the EEOC is any less serious or of lesser import than the one thereafter pursued in a federal court, if unresolved by the EEOC.[31]

Likewise, there is no basis to argue or suggest that a licensed attorney and member of the Federal Bar would be any less deliberative in filing a Title VII claim in federal court than in filing an EEOC complaint. One would hope that such attorney would engage in far greater deliberation, interviewing the client(s) and witnesses, analyzing the file generated by the EEOC and the generally scant empirical

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the scope of the EEOC claim will limit the scope of an ensuing lawsuit, Sanchez v. Standard Brands, 431 F.2d 455, 466 (5th Cir. 1970); the plaintiff must be aware of the sometimes subtle distinction between discrimination of a continuing nature and which is not, Guardian's Association of the New York City Police Dep. v. Civil Service Commission, 633 F.2d 232 (2nd Cir. 1980), aff'd 51 U.S.L.W. 5105; the plaintiff must be aware of the manner in which other time periods are calculated, Delaware State College v. Ricks, ___U.S.___, 101 S.Ct. 498, ___L.Ed.2d___ (1980); the plaintiff must be aware of res judicata/collateral estoppel effect on waivers and conciliation agreements, Williamson v. Bethlehem Steel Corp., 418 F.2d 1201 (2nd Cir. 1970), cert. den. 411 U.S. 911; the claimant must carefully identify the entities and parties against whom the charges are brought, Williams v. General Foods Corp., 492 F.2d 397, 404-405 (7th Cir. 1974); the claimant must be aware of different procedures and time-lines in states with deferral agencies, Mohasco Corp. v. Silver, 447 U.S. 708 (1980); and the plaintiff must be aware of complicated considerations if subsequent litigation is to be pursued as a class action, Albemarle Paper Co. v. Moody, 422 U.S. 405 (1975); to name only a few.

[31] Indeed, the sanctions of an award of attorney's fees against a non-prevailing plaintiff for frivolous or meritless claims could reasonably be expected to apply to such claims made in either a federal court or with the EEOC. Christianburg Garment Co. v. EEOC, 434 U.S. 412, 98 S.Ct.

data in the possession of his client, and, of course, researching the rapidly evolving case law in an attempt to divine whether his client can climb the precipitous and lofty mountain -- the Title VII prima facie case.

In this regard, it is not at all atypical for the attorney to meet his Title VII client at the eleventh hour, just before that client's right-to-sue letter expires. These clients, in the main, have pursued their claims before the EEOC pro se and may thereafter have presented themselves to a federal clerk's office for advice and/or to attempt to commence their Title VII action. Respondent fits this mold of the typical Title VII litigant. The principle of equitable tolling causes benefits to inure to all parties concerned: The would-be plaintiff is given an opportunity to stop the relatively short-fused clock from running. The litigant's attorney is afforded the opportunity to carefuly deliberate whether or not a viable Title VII claim is presented before racing to the courthouse. The defendant receives renewed notice that the plaintiff is still dissatisfied with the resolution of his claim and, more importantly, is spared ill-advised, hastily conceived lawsuits against him. The federal district court clerk and the judge to whom the case is assigned are afforded time in

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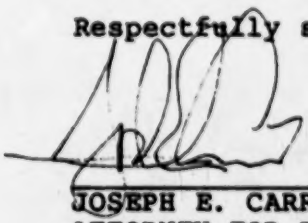
694, 54 L.Ed.2d 648 (1978).

which to honor valid requests for appointment of counsel to indigent litigant.[32]

Under the facts, most certainly respondent's filing of her right-to-sue letter and request for a court-appointed counsel should be deemed to have tolled the 90-day filing requirement of 42 U.S.C. §2000e-5(f)(1). Further, petitioner has waived and is now estopped from objecting to any defect in filing or attendant prejudice thereby caused.

Based upon this and the foregoing points and authorities of law, respondent respectfully urges this Honorable Court to deny the petition for writ of certiorari or, if granted, affirm the ruling of the Eleventh Circuit so that respondent might have the day in court to which she is legally entitled.

Respectfully submitted,



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[32]Of course, the court, as did the district court below, can (and should) enter orders requiring, inter alia, that the plaintiff or his attorney file a formal complaint within a reasonable time to insure no prejudice inures to the defendant(s).

CERTIFICATE OF SERVICE

I, Joseph E. Carr, IV, do hereby certify that on this the 20th day of October, 1983, I served a copy of the foregoing RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT upon opposing counsel by depositing same in the United States Mail, postage prepaid, and addressed as follows:

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